Court, U.S.
FILED
SEP 29 2004
OFFICE OF THE CLERK

No. 03-

In the Supreme Court of the United States

PATRICIA GRAVES and FRANK AMEDURE, SR.,
Co-Personal Representative of the Estate of
SCOTT AMEDURE, Deceased,
Petitioners,

v.

WARNER BROTHERS, THE JENNY JONES SHOW, and TELEPICTURES, jointly and severally,
Respondents.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Have the Petitioners been deprived of their rights under State Law and the United States Constitution, to Due Process and Equal Protection under the Fourteenth Amendment, by the refusal of five Justices of the Michigan Supreme Court to recuse themselves, and in deciding an appeal when they have openly expressed prejudice and bias toward an attorney involved in the case?

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners are individuals, parents of Scott Amedure, deceased. All parties are disclosed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition this Court for a writ of certiorari to review the decision by the Michigan Supreme Court, and specifically four members of that Court, in refusing to recuse themselves from deciding Petitioners Appeal in this case when these Justices have openly expressed bias and prejudice toward Petitioner's counsel.

OPINIONS BELOW

The underlying decision in this case is reported at *Graves* v. *Warner Bros.*, 469 Mich. 853, 666 N.W.2d 665 (2003).

STATEMENT OF JURISDICTION

The Michigan Supreme Court denied Petitioners Motion for Recusal on October 10, 2003 and Motion for Rehearing on January 30, 2004. This petition is brought within 90 days of that date under Supreme Court Rule 13. Petitioners respectfully invoke this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves Section I of the Fourteenth Amendment to the United States Constitution which provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This matter involves the shooting death of Petitioners' son, Scott Amedure, following an appearance on The Jenny Jones Show in March of 1995. Scott was shot and killed by Jonathan Schmitz after filming a "Same Sex Secret Crush" ambush show. This case was tried before a jury in Oakland County, Michigan. The jury awarded Amedure's estate approximately $30 million dollars.

On October 22, 2002 the Michigan Court of Appeals reversed the jury's verdict in *Graves* v. *Warner Bros.*, 469 Mich. 853, 666 N.W.2d 665 (2003). Petitioners, believing the appellate court's reasoning to be faulty, filed an Application for Leave to Appeal to the Michigan Supreme Court. This Application was denied on July 17, 2003, on a five to two vote. Voting against granting leave to appeal were Justices Markman, Corrigan, Taylor, Young and Weaver.

During the time that the Application was pending, Plaintiff's counsel, Geoffrey Fieger, had sought the recusal of Justices Markman, Corrigan, Taylor and Young in another case pending before the Court, *Gilbert* v. *Daimler Chrysler*, Michigan Supreme Court Docket No. 122457, a sexual harassment case wherein Mr. Fieger has secured a jury verdict of over $21 million on behalf of his client. The motion for recusal was based, in part, on unprecedented expressions of bias toward Mr. Fieger by sitting Justices Markman, Corrigan, Taylor and Young. The motion for recusal in that case was denied on October 30, 2003. *Gilbert* v. *Daimler Chrysler Corp.*, 469 Mich. 880, 669 N.W.2d 265 (2003), reh. den. 670 N.W.2d 560 (2003).

Petitioners filed a Motion for Recusal in the present case, referencing the motion filed in the *Gilbert* case. The Michigan

Supreme Court, likewise, denied Petitioners' motion on October 10, 2003. Specific Justices who had been requested to recuse themselves, Markman, Taylor, Corrigan and Young, all declined to address the allegations of bias and prejudice toward Mr. Fieger even though required by law to do so.

The allegations of bias begin in the early 1990's. Petitioners' trial attorney, Geoffrey Fieger, represented Dr. Jack Kevorkian, an outspoken advocate, and practitioner, of physician-assisted suicide. His views and activities were the focus of considerable controversy and media attention. John Engler, then Michigan's Governor, was an opponent of Dr. Kevorkian and his views. In February of 1993, Governor Engler signed legislation aimed at outlawing the physician-assisted suicide activities of Dr. Kevorkian. On a radio show that month, Governor Engler advocated the disbarment of Mr. Fieger to curtail the activities of Dr. Kevorkian. In response to a caller's question about what would stop Dr. Kevorkian, Governor Engler publicly stated: "We probably could stop him if his lawyer were disbarred." (App. 45a-46a ¶ 20).

In March of 1992, Governor Engler appointed the Hon. Clifford Taylor and Hon. Maura Corrigan to the Michigan Court of Appeals. Both are now members of the Michigan Supreme Court. In 1995 Governor Engler appointed Hon. Steven Markman and Hon. Robert Young to the Michigan Court of Appeals. Both have since become members of the Michigan Supreme Court. In short, by 1995, four of the members of the Michigan Supreme Court had been appointed to appellate judgeships by a Governor who had publicly advocated the disbarment of Mr. Fieger as a means to curtail the activities of Dr. Kevorkian.

In 1996, Judge (now Justice) Corrigan, reacting to a statement by Mr. Fieger which was critical of her, initiated a Request for Investigation with the Michigan Attorney Grievance Commission. This filing, made on official government stationary, could have led to the disbarment of Plaintiff's counsel. That Request has since been dismissed by the Attorney Grievance Commission. (App. 47a ¶29).

In 1998, Mr. Fieger received the nomination of the Democratic Party to run for the gubernatorial office held by Governor Engler, who was re-nominated by the Republican Party (App. 45a ¶¶ 17-18). During this time (and for some time before) Lucille Taylor, the wife of Justice Taylor, served as counsel to Governor Engler (App. 46a ¶ 21). The 1998 campaign featured acrimonious insults between Mr. Fieger and Governor Engler. When the dust settled, Governor Engler was re-elected by a wide margin. Mr. Fieger has never run for public office before or since the 1998 gubernatorial campaign.

In 2000, Justices Taylor, Markman and Young ran for re-election. The Michigan Chamber of Commerce reportedly provided over $3,000,000 in financial support to the candidacies of these Justices (National Law Journal, 10/28/02, p. A9; App. 44a ¶10). Among the ads for Justices Taylor, Markman and Young paid for by the Michigan Chamber was one which mentioned Mr. Fieger by name, and accused him of using "specious legal reasons" to foster frivolous litigation at the cost to taxpayers (App. 48a-49a ¶¶ 35-39).

Mr. Fieger was not a candidate for office in 2000. Nonetheless, the Justices and their campaign supporters publicly implied and announced opposition to Mr. Fieger personally, depicting him as the enemy. Justice Markman campaigned on the platform that he was personally an

opponent of attorneys like Mr. Fieger who represented plaintiffs in medical malpractice cases. In a public statement to a medical group, Justice Markman referred to attorneys like Mr. Fieger ("the people who quite frankly make a livelihood by suing you") as the opponents of himself and his fellow Republican nominees ("our opponents") (App. 47a ¶27).

Justice Young was even more unabashed about characterizing the relationship with Mr. Fieger as one which he regards as hateful, "Geoffrey Fieger and his trial lawyer cohorts hate this court" Nor does Justice Young regret the relationship he believes to be grounded in hate. On the contrary, his avowed position is that, "There's honor in that." (App. 46a ¶ 26).

Justice Taylor also personalized the campaign, referring to this case and others in which Mr. Fieger had obtained substantial verdicts for his clients. It is reported that Justice Taylor, at a fund-raiser, noted, "Geoffrey Fieger currently has $90 million of lawsuit awards pending in the State Court of Appeals."

The three Justices also attacked Mr. Fieger personally in a radio advertisement in which they implied that Plaintiff's counsel supported the opposing candidates because of Mr. Fieger's attraction to vicious, false, degrading attacks on them. They characterized the ads of the Democratic nominees as "vicious", "false", "seedy", a "smear campaign" and "degrading the Court and the public confidence in Michigan's judiciary", then stated that Mr. Fieger (who had nothing to do with the ads in issue) supported their opponents for that very reason, "Some people will do anything to get elected. No wonder Geoffrey Fieger, Jesse Jackson [and others support the Democratic candidates]". The voices of Justices Young,

Markman and Taylor themselves can be heard at the end of that advertisement. (App. 48a ¶ 35).

Another instance of the "anti-Fieger" tone of the 2000 campaign of Justices Young, Markman and Taylor is the "He's back . . ." flyer distributed on behalf of these Justices. The campaign literature features Mr. Fieger's face, characterizes the opposing candidates as "FIEGER's FRIENDS" and "the Fieger team", and asserts that, "Geoffrey Fieger [and others are] trying to take over Michigan's Supreme Court." (App. 49a ¶ 39).

Another piece of campaign literature distributed on behalf of Justices Taylor, Markman and Young was entitled, "Our police make critical judgements each day." That literature criticized the opposing candidates as "Geoffrey Fieger's friends." (App. 49a ¶ 40).

Yet another piece of literature characterized Judge Fitzgerald, the Democratic candidate, as a "Geoffrey Fieger libera[l]." The literature was entitled, "Forever isn't long enough for a child molester," implying that Mr. Fieger supported the sexual abuse of children. (App. 49a ¶ 41).

A significant feature of the 2000 campaign for Justices Young, Taylor and Markman was to depict Mr. Fieger as a person who had acquired wealth by bringing lawsuits that were without substantive merit. In addition to Justice Markman's ("people who . . . make a livelihood by suing you") reference and the ("Geoffrey Fieger . . . $90 million of lawsuit awards") comment of Justice Taylor, a March 3, 2000 press release criticizing Ms. Robinson (a Democratic nominee) identified her as favored by "a multi-millionaire trial lawyer" who, if elected, would allow "trial lawyers like

Geoff Fieger [to] keep getting richer while Michigan families keep footing the bill." (App. 49a ¶ 42).

The statements discussed above by and on behalf of Justices Young, Markman and Taylor accomplished their goal. All three were elected in 2000.

On July 30, 2002, the Michigan Court of Appeals affirmed the Judgment for the plaintiff in *Linda Gilbert* v. *Daimler Chrylser Corp.*, Michigan Supreme Court Docket No. 122457. Defendant Daimler Chrysler filed an Application for Leave to Appeal to the Michigan Supreme Court. At this point, the United States and Michigan Chambers of Commerce, requested, and were allowed to file *Amicus* brief on behalf of Daimler Chrysler. At about the same time, Justices Weaver and Young were running for re-election to the Michigan Supreme Court. The Michigan Chamber of Commerce financed a television campaign endorsing Justices Weaver and Young.

To Petitioners knowledge, there is no reported case in United States history in which a judge, when face with the avalanche of documented bias, has refused to recuse himself. As a result, the Amedures were denied Due Process of Law.

LAW AND ARGUMENT

I. THE MOTION FOR RECUSAL SHOULD HAVE BEEN GRANTED AND THE FAILURE TO DO SO AMOUNTED TO A DEPRIVATION OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is extraordinary and unprecedented for Justices of a state's highest court and their supporters to express publicly, virulently, and repeatedly the personal animosity expressed toward Plaintiff's counsel, Mr. Fieger. There has never before in reported history been enmity which is so personal and well-documented.

A. Overview

It is commonly said that ours is a system of law, not of men or women. That ideal reflects the profound truth that the most fundamental feature of American justice is that it is administered by those having no interest, or apparent interest, in the outcome. *Talbert v Muskegon Construction Co*, 305 Mich. 345, 348, 9 N.W.2d 572 (1943).

An impartial judiciary is of obvious importance to the litigants and attorneys whose cases are adjudicated. This interest is recognized by the core precept of constitutional law that the Due Process Clause guarantees an impartial decision-maker. *People v Lowenstein*, 118 Mich. App. 475, 482-483, 325 N.W.2d 462 (1982) ("The right to a fair tribunal is a right grounded in due process").

The rights of parties and counsel, weighty as they may be, are not the only interests implicated. Canon 2A of the

Michigan Code of Judicial Conduct demands that Judges "avoid all impropriety and appearance of impropriety" to foster "[p]ublic confidence in the judiciary." Canon 2B calls upon judges to "promote public confidence in the integrity and impartiality of the judiciary." The Michigan Supreme Court itself has even recognized that a judge's failure to recuse himself when required constitutes sanctionable judicial misconduct. *In re: Waterman*, 461 Mich. 1207, 625 N.W.2d 748 (1999). Judicial fairness, and the appearance of fairness, are essential to the public confidence from which the rule of law derives its legitimacy.

The federal grounds for judicial disqualification are statutory. *Liteky v United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474, 483-487 (1994). Under the federal statutes, disqualification is in order, *inter alia*, where a party shows "that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party" 28 U.S.C. § 144] or where the judge "has a personal bias or prejudice concerning a party" [28 U.S.C. § 455(b)(1)]. The goal of § 455 is "to avoid even the appearance of partiality." *Liljeberg v Health Services Corp*, 486 U.S. 847, 860-861, 108 S.Ct. 2194, 100 L.Ed.2d 855, 867 (1988). The federal statutes have been regarded as probative of the meaning of Michigan's MCR 2.003. *Cain v Department of Corrections, supra* 451 Mich. at 495-496.

In Michigan, the issue of disqualification is addressed by court rule rather than statute. The grounds for disqualification are spelled out in Michigan's Rules of Court, MCR 2.003(B), which states in relevant part.

> "A judge is disqualified **when the judge cannot impartially hear a case, including but not limited to** instances in which:

> (1) The judge is **personally biased or prejudiced for or against a party or attorney.**
>
> * * *
>
> (5) The judge knows that he or she . . . has an economic interest in the subject matter in controversy or in a party to the proceeding or has **any other more than de minimis interest that could be substantially affected by the proceeding**" (emphasis supplied).

While reported decisions about the recusal of Michigan Supreme Court Justices are rare, in *People v Brown*, 429 Mich. 877, 415 N.W.2d 864 (1987), Justice Dennis Archer recused himself, citing Rule 2.003. In *Brown*, the basis for recusal was that, in the recent past, counsel for a litigant had been "of counsel" to Justice Archer's law firm. That attenuated relationship, without more, was thought to make it inappropriate for Justice Archer to consider the merits of the appeal, even though he had participated in considering the Application. The grounds in this case are far more indicative of partiality than those which resulted in recusal in *Brown*.

B. The "Appearance" Standard

It is sometimes said that disqualification is not required absent "actual" prejudice. See *e.g. Cain*, 451 Mich. at 495; *Park v American Casualty Ins Co,* 219 Mich. App. 62, 78, 555 N.W.2d 720 (1996) (Corrigan J, concurring) (noting that an arbitrator's strategic suggestion might require disqualification). However, this does not mean that the outcome is resigned to a judge's pronounced subjective view of his or her own fairness.

If the judge's own assessment were the sole test, there would be no need for the review permitted by Rule 2.003(C)(3)(a). Indeed, such a view would allow the most partisan judge to malevolently implement bias by merely denying its existence.

In *North Dakota v Johnson*, 55 N.D. 437, 442, 214 N.W. 39, 40 (1927), the Court explained, regarding disqualification of a grand juror:

> " [W]hat he may say about his lack of prejudice or bias must be considered in the light of our human experience. We know, if we stop to think about it, that the last thing in the world we will admit, even to ourselves, is bias or prejudice against another. We may not like him, or may hate him heartily, yet as we are always in the right about it, we have no bias or prejudice against him. We are always confident that we can treat him fairly, considering that he is bound to be in the wrong . . .".

Thus, while cases have sometimes articulated the words "actual prejudice" in principle, they have also recognized, in practice, that it is necessary to look to the particular circumstances to determine whether an objective observer might reasonably question the judge's impartiality. *Liteky*, 127 L.Ed.2d at 486; *Cain*, 451 Mich. at 495, fn. 29 (defining bias or prejudice in terms of what "a fair-minded person could not entirely set aside when judging certain persons or causes") 512-513, fn. 48, 514 (the due process inquiry "requires a case-by-case determination of when the risk of actual bias is too prevalent"); *Ireland v Smith*, 214 Mich. App. 235, 250, 542 N.W.2d 344 (1995).

C. Extrajudicial Bias or Prejudice

Recusal is ordinarily not a remedy for adverse judicial decisions, but is the relief where prejudice or bias is "personal" and arises from an "extrajudicial source." *Liteky*, 127 L.Ed.2d at 483-491. This case involves the classic disqualification paradigm: events outside the scope of this case which may cause certain Justices not to provide Petitioner with the impartial consideration to which she is legally and constitutionally entitled, a classic case for recusal.

D. The Fourteenth Amendment Due Process Guarantee

At its core, the Due Process Clause guarantees an unbiased decision-maker. *Cain*, 451 Mich. at 497-502; *Crampton v Department of State*, 395 Mich. 347, 351 (1975). The Constitution requires disqualification without a showing of "actual" bias, where "experience teaches that the probability of actual bias is too high to be constitutionally tolerable" *Crampton*, 395 Mich. at 351; *Cain*, 451 Mich. at 498; *Withrow v Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975).

Cain and *Crampton* have identified certain specific situations where recusal is constitutionally required. One such situation is where the judge "has been the target of personal abuse or criticism from the party before him", *Cain*, 451 Mich. at 498; *Crampton*, 395 Mich. at 351; *Withrow*, 421 U.S. at 47, n. 15; *Mayberry v Pennsylvania,* 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971).

Another constitutionally required ground for disqualification is where the judge "has a pecuniary interest in the outcome." *Crampton*, 395 Mich. at 351; *Cain*, 451

Mich .at 498; *Ward v Monroeville*, 408 U.S. 57; 94 S.Ct. 80; 23 L.Ed.2d 267 (1972).

A third basis for constitutional disqualification is when the judge is "enmeshed in [other] matters involving [the movant]", *Crampton*, 395 Mich. at 351; *Cain*, 451 Mich. at 498; *Johnson v Mississippi*, 403 U.S. 212; 91 S.Ct. 1778; 29 L.Ed.2d 423 (1971).

These are not the exclusive constitutional criteria. The due process standard for disqualification applies whenever the circumstances are such that "the probability of actual bias is too high to be constitutionally tolerable."

E. Recusal was warranted under either State or Constitutional standards.

1. The Statements And Conduct In Issue, Viewed Independently and Collectively, Warrant The Recusal of Justices Corrigan, Taylor, Markman, Young and Weaver.

There are a number of facts and circumstances which, individually and collectively, warrant recusal. These include the historic enmity between Plaintiff's counsel, Mr. Fieger, and Governor Engler, who appointed the four Justices to appellate judgeships. Justice Young, who has publicly proclaimed a "hate" relationship with Plaintiff's counsel, should recuse himself on that basis. Similarly, the antipathy toward Plaintiff's counsel by Chief Justice Corrigan, who unsuccessfully sought professional discipline against him, warrants her recusal. The campaign literature of Justices Markman, Young and Taylor attacked Plaintiff's counsel. These Justices, or their campaigns, have publicly taken the

position that most litigation is frivolous and that Plaintiff's counsel uses specious arguments. Finally, these Justices have taken public positions regarding Mr. Fieger's financial affairs and his economic interest in this case, and should have recused themselves for that reason as well.

2. The Magnitude Of The Public Campaign Benefit Warrants Recusal.

Given the reality of political judicial campaigns, donations to or on behalf of a judge's candidacy do not necessarily require recusal. Active involvement in fundraising presents a more difficult issue [compare *Armstrong v Ypsilanti*, 248 Mich. 573, 500, 640 N.W.2d 321(2001)(past fundraising for judge does not require recusal) with *People v Brown, supra* (statement of Justice Archer suggesting that a judge's participation in fundraising for a litigant may require disqualification)]. In general, the prevailing view is that campaign contributions are relevant to the disqualification calculus, do not necessarily lead to recusal, but may require recusal where the amount is extraordinary. See *Ex Parte Bryant*, 675 So.2d 552 (Ala. Crim. App., 1996).

Here, the economic benefit to Justices Taylor, Young, Weaver and Markman from the millions of dollars contributed by the Michigan Chamber of Commerce to their campaigns vastly exceeds the amount of any other contribution. The payments were made in the context of a campaign which urged voters to elect Justices Markman, Young and Taylor to oppose Mr. Fieger personally and to protect businesses against lawsuits which were mostly "frivolous" (see argument, *infra*).

On the most benign level, those aspiring to be Supreme Court Justices necessarily have a strong desire to attain that

office - - the campaign rigors and unkind criticisms they undergo attest to that desire. Just as obviously, it is the most basic human nature to be profoundly grateful to, and wish to reciprocate the kindness of, an interested party whose massive payments have enabled a Justice to attain his or her seat. The Justices in this case should have recused themselves from ruling on a multi-million dollar verdict obtained by the very poster-child of their animosity, Geoffrey Fieger

3. Justices Taylor, Corrigan, Young And Markman May Harbor Bias Or Prejudice Against Plaintiff's Counsel Arising Out Of The Acrimonious Controversies Between Mr. Fieger And Governor Engler, And Their Respective Political Allies, Including The Debate Over Physician-Assisted Suicide And The 1998 Gubernatorial Campaign.

Michigan has a strange system of electing Supreme Court Justices to an office that is supposed to be free of partisan influence. In reality, that system - - by which candidates are nominated by political parties and are dependent on campaign contributions - - is one fraught with the risk of judicial partisanship.

Justices Taylor, Corrigan, Young and Markman owe their judgeships, at least at the outset, to Governor Engler. The understandable human reaction must be one of gratitude and a sense of allegiance to the person singly responsible for the awesome judicial power.

This case involves far more than the inevitable difference in political views that may arise when a litigant is represented

by counsel of a political party different than that of a Governor who appointed Judges or Justices. Rather, it involves intense, regrettably personal, enmity. While the mutual disrespect between Governor Engler and Mr. Fieger does not inherently require the recusal of Judges or Justices appointed by the former Governor, it does provide the backdrop to animosity that far transcends simple, and civil, political disagreements.

It is unknown what, if anything, Governor Engler may have said to his appointees about Plaintiff's counsel. What is known is the close relationship between Justice Taylor and Governor Engler. Chief Justice Corrigan has not been removed from the Fieger-Engler clash over Dr. Kevorkian. Her own late husband was openly critical of Plaintiff's counsel. It is understandable that she may share in the sentiments expressed by Mr. Grano.

Both the Michigan Court Rules and Fourteenth Amendment seek to prevent a litigant's rights from resting in the hands of a decision-maker predisposed against that litigant or her representative. In *Cain*,451 Mich. at 49, fn. 29, the Court discussed the meaning of "bias or prejudice":

> "Bias or prejudice has been defined as 'an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes.' *United States v Conforte*, 624 F.2d 869, 881 (9th Cir., 1980.)"

Under any circumstances, a fair-minded person who owes his or her judgeship to Governor Engler would be hard-pressed to "entirely set aside" "hostility" when judging a case brought by Mr. Fieger whose enmity with Governor Engler

has been so public and virulent. Neither justice nor its appearance is served by resigning Plaintiff's fate to decision-makers who harbor that attitude toward Plaintiff's attorney.

4. Justice Young Should Have Recused Himself Because Of The Perceived "Hate"Relationship With Mr. Fieger In Which He Finds "Honor."

Justice Young has publicly proclaimed his belief that Plaintiff's counsel, Mr. Fieger, hates him. He has expressed the "honor" he finds in a relationship characterized by hate. Feelings toward Plaintiff's counsel as overwhelming as "hate" make it inappropriate for Justice Young to sit in judgment of this case, or any other case involving jury verdicts obtained by the "object" of this "hate." That is true both under the Fourteenth Amendment standard or Rule 2.003(B)(1)("personally biased or prejudiced . . . against [an] attorney").

Justice Frankfurter has observed, "Where there is ground for believing that . . . unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves . . ." *Public Utilities Commission of DC v Pollak*, 343 U.S. 451, 466, 72 S.Ct. 813, 96 L.Ed 1068 (1952). Surely Petitioner can only believe "not unfairly" that she cannot receive the totally impartial consideration of a Justice who regards his relationship with her attorney as hateful.

Similar sentiments were expressed in *People v Lobsinger*, 64 Mich. App. 284, 289-290, 235 N.W.2d 761(1975), where the trial judge acknowledged a measure of animus against the accused which, the court was certain, would not cloud his

judgment. Even so, the Court of Appeals concluded that recusal was appropriate, noting:

> "A judge is not expected to bring with him to the bench a blank mind and personality, as he becomes, by necessity, a composition of the general experiences of his life, refined and honed by his legal training and legal experience so that the desired judicial temperament will hopefully emerge... It is his duty not to permit these prejudices to override his responsibilities in providing a fair forum for the determination of controversy. This duty should ideally motivate the judge to request reassignment of the case if he is aware of any prejudices which he holds which would interfere with his impartiality."

The perceived "hate" involved in this case is much stronger than the animus deemed to require disqualification in *Lobsinger*. No lesser measure of relief should apply here.

There may be no objective reality to Justice Young's perception that he is hated by Plaintiff's counsel. What is important is that, rightly or wrongly, Justice Young perceives himself as hated. One can scarcely be expected to maintain impartiality in the face of an inter-personal relationship expressed by the strongest word in the English language to describe animosity.

Perhaps even more troubling is that Justice Young has no regret about that perceived animosity. Instead of lamenting the perceived hatred, he seemingly delights in it, believing it an "honor" to be hated. The unmistakable implication is that Justice Young is delighted to reciprocate, publicly no less, the hate which he believes is directed toward him by Mr. Fieger.

In other cases, the challenged judge regarded counsel as a party with animosity that was not expressed in terms as strong as "hate." Even so, recusal has been deemed appropriate where a clear animosity between the judge and counsel exists. See *e.g. Town Centre of Islamorada, Inc v Overby*, 592 So.2d 774 (Fla App, 1992); *Tower Group, Inc v Doral Enterprises*, 760 So.2d 256 (Fla. App., 2000) (counsel was judge's opponent in an acrimonious campaign);[1] *Kentucky Journal Publishing Co v Gaines*, 139 Ky. 747; 110 S.W .268 (1908) (political enmity and publicly announced position required recusal); *Ponder v Davis*, 233 N.C. 699; 65 S.E.2d 356 (1951) (political activities adverse to the movant). In *Stephen v Natchez*, 261 So.2d 486, 489 (Miss, 1972), the trial judge expressed his belief that there was a "lot of political motivation, revenge and hate in connection with this lawsuit." The imputation of hate was one of several factors leading to the conclusion that the judge should have recused himself.

At bottom, a fair minded suitor like Petitioner herein cannot believe that her case will be fairly decided by a Justice who deems it honorable to be hated (as he believes) by her counsel. An objective observer would regard an emotion as intense as hatred as preventing dispassionate judicial consideration. Because of these publicly announced sentiments, Justice Young should have recused himself from participation in this case.

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[1]Although Mr. Fieger was not literally the opponent of Justices Taylor, Markman and Young, campaign literature disseminated on their behalf treated him as their electoral adversary (see argument *infra*).

5. Justice Corrigan Should Have Recused Herself After Filing A Grievance Against Plaintiff's Counsel.

The existence of inter-personal animosity, or collateral litigation ,between a judge and counsel has been frequently regarded as calling upon a judge to refrain from judging a case of his or her adversary. Indeed, a judge who is "enmeshed in other matters" involving the movant may be regarded as constitutionally disqualified for that reason. *Johnson v Mississippi*, 403 U.S. 212, 215, 91 S.Ct. 1778, 29 L.Ed.2d 423, 427 (1971); *Crampton v Dept of State*, 395 Mich. 347, 351, 235 N.W.2d 352 (1975); *Cain*, 451 Mich. at 498.

Prior Michigan cases have not directly addressed the propriety of a judge sitting in a case where the judge has previously initiated bar disciplinary proceedings against counsel. In the converse setting (attorney formally filed a Judicial Tenure Commission complaint against the judge), divergent results have reached. Earlier cases regarded a judge as disqualified from hearing a case where counsel had complained of the judge. *Auto Workers Credit Union v Kogler*, 32 Mich. App. 257, 259, 188 N.W.2d 184 (1971). More recent cases have rejected a *per se* rule of disqualification under these circumstances. *People v Bero*, 168 Mich. App. 545, 552, 425 N.W.2d 138 (1988); *Czuprinski v Bay Judge*, 166 Mich. App. 118, 126, 420 N.W.2d 141 (1988).

Had Mr. Fieger sought a Judicial Tenure Commission investigation of Chief Justice Corrigan, these authorities would suggest that recusal would not be automatic, but might be appropriate. The same may be said of any criticisms or insults about Chief Justice Corrigan that Mr. Fieger may have

undertaken. That situation would raise the legitimate concern that, regardless of the justness or unjustness of the accusations leveled at her, Chief Justice Corrigan might understandably be so offended at being attacked that her impartiality could be called into question.

Notably, the rationales for the "no *per se* approach" have application only to the "attorney complaining about judge" context, and do not undermine the propriety of disqualification in the converse context of this case. In *Czuprinski*, the Court noted that the prior conduct - - a filing **by the lawyer** - - was not indicative of the critical issue - - the mindset **of the judge** (a grievance filed by counsel, "has no tendency . . . to show actual bias or prejudice on the part of the judge against the grievant"). Here, the pertinent conduct is that of the judge, Chief Justice Corrigan, whose sentiments can be determined from her own filing.

In practice, recusal in these situations has been the norm. *People v Gauntlett*, 134 Mich. App. 737, 741-742, 760-761; 352 N.W.2d 310 1984) (recusal of judges who had filed a grievance against counsel). There are several reasons why that is the appropriate result here.

In 1993, Governor Engler had publicly suggested the disbarment of Mr. Fieger as a means of ending the activities of Dr. Kevorkian. Chief Justice Corrigan's husband was an outspoken critic of Dr. Kevorkian's activities. After having been appointed by Governor Engler, Chief Justice Corrigan made the filing which could have resulted in the disbarment of Mr. Fieger, as her sponsor had publicly discussed. The inevitable appearance of these events is one of personal animosity to Mr. Fieger arising from the spirited conflict which pitted Mr. Fieger and Dr. Kevorkian against Governor Engler, Chief Justice Corrigan, and her husband.

Even without the context provided by Governor Engler's call for disbarment, the filing of a Request of Investigation is inherently personal in nature. Such a filing jeopardizes the attorney's ability to represent clients, pursue a chosen career, or earn a livelihood. Feelings so intense that they motivate a judge to attempt to destroy an attorney's career undermine the right to an impartial decision-maker.

It is also significant that the Request against Mr. Fieger has been dismissed. If it had been sustained, one might at least plausibly contend that a client whose attorney has been professionally disciplined cannot complain about a meritorious grievance filing. Here, however, no such contention can be made. Indeed, the Attorney Grievance Commission's disinclination to pursue a grievance based on calling judges names had been established by its decision not to pursue the complaint about Governor Engler for his comments regarding a Michigan Circuit Court Judge.

In the final analysis, Chief Justice Corrigan's unsuccessful efforts to have Plaintiff's counsel professionally disciplined bespeaks a disqualifying bias or prejudice against him. Under MCR 2.003, Chief Justice Corrigan should have recused herself. That result is required under the Fourteenth Amendment as well.

6. Justices Markman, Young and Taylor, Whose Campaign Literature Attacked Plaintiff's Counsel, Should Have Recused Themselves.

In 2000, Mr. Fieger was not a candidate for political office. Nonetheless, the campaign advertisements of Justices Markman, Young and Taylor cast Plaintiff's counsel as their opponent. This campaign approach raises two distinct bases

for recusal: the expression of personalized opposition to Mr. Fieger, and the implicit public campaign promise that, if elected, they will oppose Mr. Fieger's perceived interests.

In fairness, it may be noted that these "anti-Fieger" statements were made by the party that nominated the Justices rather than the Justices themselves. What is known is that the Justices themselves personally participated in making Plaintiff's counsel a target in the 2000 campaign. The voices of Justices Young, Markman and Taylor were used in the commercials. The professed belief of Justices Young, Markman and Taylor that Plaintiff's counsel relishes vicious, false efforts to degrade the Court and erode public confidence, on the basis of a campaign ad by the Democratic candidates that Mr. Fieger had nothing to do with, conveys the disrepute in which Plaintiff's counsel is held by these Justices, a disrepute that may be regarded as "bias" or "prejudice" in the absence of any involvement by Mr. Fieger in the Democratic ad that spawned the comments.

In *State v Garner*, 760 S.W.2d 893, 906 (Mo. App., 1988), the court recognized how prior adverse statements are inconsistent with the impartiality that is required:

> "Conduct or speech of a trial judge indicative of a belief as to the accused's guilt is the antithesis of impartiality. Acts or conduct [that] give the appearance of partiality should be avoided with the same degree of zeal as acts or conduct [that] inexorably bespeak partiality."

The Michigan Supreme Court has specifically addressed how disparagement of counsel by a judge undermines public confidence in the judiciary. In its unanimous decision in *In re*

Bennett, 403 Mich. 178, 193; 267 N.W.2d 914 (1978), the Court observed:

> "[Judge Bennett's] public disparagement of certain attorneys, county commissioners, and the judicial system itself, must have prejudiced and left many doubtful of the impartiality and effectiveness of the administration of justice in Branch County and in this entire state. See *In the Matter of Del Rio*, 400 Mich. 665, 256 N.W.2d 727 (1977);

For Justices Markman, Young and Taylor to sit in judgment of this case after the public disparagement of Mr. Fieger would "[leave] many doubtful of the impartiality . . . of the administration of justice . . . in this entire state." That result should have been avoided by recusal.

7. Justices Markman, Taylor and Young, On Whose Behalf Has Been Taken The Position that Most Litigation is Frivolous And That Plaintiff's Counsel is Responsible, Should Have Recused Themselves.

The message of the "anti-Fieger" ads discussed above is unmistakable: if voters elect Justices Young, Markman and Taylor, they will thereby strike a blow against Mr. Fieger. The way these Justices can fulfill their campaign theme is, of course, to vacate a substantial verdict obtained by Plaintiff's counsel, striking Mr. Fieger (and, not coincidentally, his client) "where it hurts", financially.

The fact that the position of these Justices has been publicly taken gives rise to another, and related concern. Their comments reflect a public position to which the Justices

have committed themselves, a position which this case implicates, before the Application in this case was ever filed.

Canon 3 A(6) enjoins judges to refrain from advance public comment on matters which may come before the court ("A judge should abstain from public comment about pending or impending proceedings in any court . . ."). The very purpose of that prohibition is to assure open mindedness and avoid the recusal that would be required by prejudgment.

The Court explained in *Stretton v Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F.2d 137, 142, 144 (3d Cir., 1991):

> "If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery. The idea of an adjudication reached after a fair hearing, giving due consideration to the arguments and evidence produced by all parties no longer would apply and the confidence of the public in the rule of law would be undermined."
>
> * * *
>
> "The public has the right to expect that a court will make an assessment of the facts based on the evidence submitted in each case, and that the law will be applied regardless of the personal views of the judge. Taking a position in advance of litigation would inhibit the judge's ability to consider the matter impartially. Even if he or she should reach the correct result in a given case, the campaign announcement would leave the impression, if not in actuality, the case was prejudiced rather than adjudicated through a

proper application of the law to facts impartially determined."

In the most literal sense, "prejudice" or pre-judging, occurs when a judge has reached a conclusion about an issue, or a case, even before that case has been presented to the judge. The very essence of judicial impartiality requires that the facts, briefs, arguments, and issues of a case are presented **before** a judicial decision, tentative or final, is reached. Judges who have reached conclusions about personalities, cases, or issues even before receiving a single filing have *ipso facto* engaged in the very pre-judgment which our system of justice abhors. It is seemingly for this reason that it is regarded as improper for judges or judicial candidates to adopt or announce a position on issues that might later come before the court

The disqualifying nature of judicial prejudgment is compounded when it is announced publicly. The very act of public announcement makes the existence of prejudgment undeniable. Apart from the pernicious affect on the targeted party and counsel, public announcements bespeak an insensitivity to the non-partisan nature of the judicial office. Minimally, it draws the judiciary into disrespect when judges or Justices publicly announce a pre-disposition to issues, cases, parties, or attorneys who may, but have not yet, come before them. The public announcement of a position regarding a case or controversy before it has reached the judge for decision can only be regarded as the "prejudice" which Canon 3 A(6) and Rule 2.003 seek to avert.

The impact is greater still when the pronouncements are made during the course of a political campaign. Canon 3 A(1) makes it clear that, "a judge should be unswayed by partisan interests, public clamor, or fear of criticism." The willingness

to make public statements suggesting a decisional predisposition implies a desire to do what is perceived as popular, what is likely to curry electoral favor, rather than what the untainted legal merits, as they may later be presented, might require. Campaigning on the implied propensity to disfavor a particular attorney or class of attorneys or litigants disqualifies one to decide cases of the type the judge has publicly announced a position on.

On the most benign level, public statements, even outside the electoral context, erect a hurdle to a later contrary decision. Even this relatively benign impact was regarded as cause for disqualification in *Ireland*, 214 Mich. App. at 251:

> "In our view, it would be unreasonable to expect the trial judge to be able to put previously expressed views out of his mind without substantial difficulty. *United States v Sears, Roebuck & Co, Inc*, 785 F.2d 777 (9th Cir., 1986). We find that the advancement of the interests of preserving the appearance of justice and fairness outweigh other considerations here. Accordingly, we reverse the trial court's decision to deny plaintiff's motion to disqualify and order this case to be heard by a different judge on remand."

The same result should follow here. Justices Markman, Taylor and Young should have recused themselves.

8. The Expressed Positions Regarding Mr. Fieger's Financial Affairs, And His Economic Interest in This Case, Provide An Additional Basis For Recusal.

Two themes discussed above - - Mr. Fieger and his economic interests in cases where he was trial counsel - - have intersected in two more communications. By press release of March, 2000, the Republican Party, which nominated Justices Markman, Young and Taylor, castigated Democratic candidate Marietta Robinson, once more drawing Mr. Fieger into the fray. The release explicitly opposed Mr. Fieger on economic grounds referring to a "multi-millionaire trial lawyer like Geoff Fieger" and "ridiculous multi-million dollar judgments that have ordinary folks wondering what has gone wrong with our judicial system." The release suggested the tack - - embraced later in the campaign - - of appealing to popular sentiment against financially successful advocates for plaintiffs ("Multi-millionaire trial lawyers are not 'mainstream' Michigan").

This theme was echoed in several other ads. Justice Taylor used his campaign to publicize verdicts obtained by Mr. Fieger, including the case of Linda Gilbert ["Taylor noted, 'Geoffrey Fieger currently has $90 million of lawsuit awards pending in the State Court of Appeals']". That campaign reference includes the Gilbert case as well as the present case.

Other courts have confronted the situation where a case is presented to a judge who has previously commented on it publicly. Where that occurs, a judge is regarded as disqualified. *Ex Parte James*, 713 So.2d 869 (Ala., 1997) (trial judge disqualified from case on which he took a public position); *State ex rel Russa v Himes*, 144 Fla. 145 (1940) (judge who had publicly commented on the accused is

required to recuse himself from the case); *Martin v State*, 804 So.2d 360 (Fla. App., 2001) (public announcement of intention prior to getting the case warrants recusal); *Kentucky Journal Publishing Co v Gaines*, 139 Ky 747; 110 S.W. 268 (1908) (political enmity and publicly announced prior position requires disqualification); *McCullough v Davis*, 147 P .779 (Okla., 1915) (judge disqualified from hearing case he had publicly discussed in his campaign).

Conclusion

This case presents an unprecedented number of events and statements. The bias and prejudice is manifest. The failure of the Michigan Supreme Justices to recuse themselves amounted to a denial of Petitioners' right to a fair tribunal as guaranteed by the due process clause of the Fourteenth Amendment to the United States Constitution. Petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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Counsel for Petitioners

Date: April 29, 2004

APPENDIX A

SUPREME COURT OF MICHIGAN

Case No. SC:123104

[Decided January 30, 2004]

PATRICIA GRAVES and FRANK AMEDURE, SR., as Personal Representatives of the Estate of SCOTT AMEDURE, Deceased,
Plaintiffs-Appellants,

v

WARNER BROS., JENNY JONES SHOW, and TELEPICTURES, jointly and severally,
Defendants-Appellees.

JUDGES: Weaver, J., not participating in the motion for reconsideration of the denial of the motion to recuse Chief Justice Corrigan and Justices Taylor, Young, and Markman dissents.

OPINION:

On order of the Court, the motion for reconsideration of this Court's order of October 10, 2003, denying the motion for recusal and evidentiary hearing, is considered, and it is

DENIED, because it does not appear that the order was entered erroneously.

DISSENT:

Weaver, J., not participating in the motion for reconsideration of the denial of the motion to recuse Chief Justice Corrigan and Justices Taylor, Young, and Markman, states:

This Court denied leave to appeal in this case on July 17, 2003.[1] Subsequently, plaintiff filed both a motion for rehearing and a motion requesting that Chief Justice Corrigan and Justices Weaver, Taylor, Young, and Markman recuse themselves from the appeal.

I concurred in the Court's October 10, 2003, decision to deny the motion for rehearing, and wrote separately to decide the motion requesting that I recuse myself.[2] I denied plaintiff's motion requesting that I recuse myself from the case, on the grounds that "I am neither biased nor prejudiced for or against any of the parties or their attorneys in this case, and plaintiff asserts no grounds supporting my recusal from participating in this appeal." I did not participate in the decision regarding the motion to recuse Chief Justice Corrigan and Justices Taylor, Young, and Markman.

Plaintiff has now filed a motion for reconsideration of the denial of plaintiff's motion for recusal and an evidentiary

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[1] *Graves v Warner Bros*, 469 Mich. 853; 666 N.W.2d 665 (2003).

[2] *Graves v Warner Bros*, 469 Mich.___ ; 669 N.W.2d 552 (2003).

hearing. In the motion for reconsideration, plaintiff specifically states that she does not seek reconsideration of my decision not to recuse myself because I gave detailed reasons for my decision.

But plaintiff does ask that I reconsider my decision not to participate in deciding the motion for recusal as it relates to Chief Justice Corrigan and Justices Taylor, Young and Markman. I decline to do so. A challenged judge decides the motion asking for his disqualification. MCR 2.003(C)(1)(3). Therefore, I do not participate in the motion for reconsideration with regard to the other four justices, and I do not decide whether or not my colleagues should grant the motion for reconsideration and recuse themselves.

APPENDIX B

SUPREME COURT OF MICHIGAN

Case No. SC:123104

[Decided October 10, 2003]

PATRICIA GRAVES and	)
FRANK AMEDURE, SR., as Personal	)
Representatives of the Estate of	)
SCOTT AMEDURE, Deceased,	)
Plaintiffs-Appellants,	)
	)
v	)
	)
WARNER BROS.,	)
JENNY JONES SHOW, and TELEPICTURES,	)
jointly and severally,	)
Defendants-Appellees.	)
	)

JUDGES: Cavanagh and Kelly, JJ., would grant reconsideration and, on reconsideration, would grant leave to appeal. Kelly, J., not participating in the decision regarding the motion for recusal and for evidentiary hearing. Weaver, J., not participating in the decision regarding the motion to recuse Chief Justice Corrigan and Justices Taylor, Young, and Markman, denies the motion to recuse herself.

OPINION:

On order of the Court, the motion for reconsideration of this Court's order of July 17, 2003 is considered, and it is DENIED, because it does not appear that the order was entered erroneously. The motion for recusal and for an evidentiary hearing is also considered, and it is DENIED.

Cavanagh and Kelly, JJ., would grant reconsideration and, on reconsideration, would grant leave to appeal.

Kelly, J., not participating in the decision regarding the motion for recusal and for evidentiary hearing.

Weaver, J., not participating in the decision regarding the motion to recuse Chief Justice Corrigan and Justices Taylor, Young, and Markman, denies the motion to recuse herself, concurs in the denial of the motion for rehearing, and states:

This Court denied leave to appeal in this case on July 17, 2003.[1] Subsequently, plaintiff filed a motion for rehearing and a motion requesting that Chief Justice Corrigan and Justices Weaver, Taylor, Young, and Markman recuse themselves from this appeal.

I concur in the Court's decision to deny the motion for rehearing, and write separately to decide the motion requesting that I recuse myself.

A challenged judge decides the motion asking for his disqualification. MCR 2.003(C)(1)(3). Therefore, even

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[1] *Graves v Warner Bros*, 469 Mich. 853; 666 N.W.2d 665 (2003).

though the plaintiff's motion also asks for the recusal of Chief Justice Corrigan and Justices Taylor, Young, and Markman, the only issue before me is whether I should recuse myself from participating in this appeal. I do not decide whether my colleagues should recuse themselves or not.

Plaintiff's motion for recusal is based on the same grounds alleged in the April 16, 2003 motion filed in *Gilbert v DaimlerChrysler,* Docket No. 122457 to recuse the same justices. But plaintiff recognizes that the allegations pertaining to the Michigan Chamber of Commerce participating as amicus curiae in *Gilbert v DaimlerChrysler* do not apply in this case.[2]

In requesting my recusal from the appeal in *Gilbert v DaimlerChrysler*, plaintiff asserted only that the Michigan Chamber of Commerce, which filed a brief as amicus in that case, contributed to my campaign for reelection to the Michigan Supreme Court in 2002 and aired advertisements advocating my reelection.[3] There are no allegations in either *Gilbert v DaimlerChrysler* or this case that I made or caused to be published any statements about any of the parties, their

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[2] Footnote 1 in plaintiff's Motion for Recusal and for Evidentiary Hearing, filed with the Court August 7, 2003, states: "The only allegations in the *Gilbert* Motion for Recusal which do not directly apply to the present case are those pertaining to the Michigan Chamber of Commerce and it [sic] involvement in the *Gilbert* case as *Amicus Curiae.*"

[3] For the full text of the allegations requesting my recusal, see my statement of reasons for denying the motion for recusal in *Gilbert v DaimlerChrysler*, 469 Mich. 880; 669 N.W.2d 265; 2003 Mich. LEXIS 2039 (2003).

attorneys, the amicus, or issues in the case that would raise the issue of bias or prejudice on my part.

I am neither biased nor prejudiced for or against any of the parties or their attorneys in this case, and plaintiff asserts no grounds supporting my recusal from participating in this appeal. Accordingly, I deny plaintiff's motion requesting that I recuse myself from this case.

APPENDIX C

SUPREME COURT OF MICHIGAN

Case No. SC:123104

[Decided July 17, 2003]

PATRICIA GRAVES and FRANK AMEDURE, SR., as Personal Representatives of the Estate of SCOTT AMEDURE, Deceased,
Plaintiffs-Appellants,

v

WARNER BROS., JENNY JONES SHOW, and TELEPICTURES, jointly and severally,
Defendants-Appellees.

JUDGES: Cavanagh and Kelly, JJ., would grant leave to appeal.

OPINION:

On order of the Court, the delayed application for leave to appeal the October 22, 2002 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh and Kelly, JJ., would grant leave to appeal.

APPENDIX D

COURT OF APPEALS OF MICHIGAN

Case No. 226645

[Decided October 22, 2002]

PATRICIA GRAVES and FRANK AMEDURE, SR., as Personal Representatives of the Estate of Scott Amedure, Deceased,
Plaintiffs-Appellees,

v

WARNER BROS., JENNY JONES SHOW, and TELEPICTURES, jointly and severally,
Defendants-Appellants.

JUDGES: Before: Murphy, P.J., and Griffin and Meter, JJ. Meter, J., concurred. MURPHY, P.J. (dissenting).

OPINION:

GRIFFIN, J.

Defendants appeal as of right from the entry of judgment in the amount of $29,332,686 following the jury's verdict in plaintiffs' favor in this wrongful death action. We reverse the

judgment, vacate the court's order, and remand for entry of a judgment and order in favor of defendants, holding that under the circumstances defendants owed no legally cognizable duty to protect plaintiffs' decedent from the homicidal acts of a third party.

I

The instant case has its origins in the tragic murder of plaintiffs' decedent, Scott Amedure, in March of 1995 by Jonathan Schmitz, who was ultimately convicted of second-degree murder. The facts underlying the highly publicized criminal case are set forth in this Court's decision, *People v Schmitz*, 231 Mich. App. 521, 523; 586 N.W.2d 766 (1998), which addressed Schmitz' original appeal of his murder conviction:

> This case arises from defendant's killing of Scott Amedure with a shotgun on March 9, 1995. Three days before the shooting, defendant appeared with Amedure and Donna Riley in Chicago for a taping of an episode of the Jenny Jones talk show, during which defendant was surprised by Amedure's revelation that he had a secret crush on him. After the taping, defendant told many friends and acquaintances that he was quite embarrassed and humiliated by the experience and began a drinking binge.
>
> On the morning of the shooting, defendant found a sexually suggestive note from Amedure on his front door. Defendant then drove to a local bank, withdrew money from his savings account, and purchased a 12-gauge pump-action shotgun and some ammunition. Defendant then drove to Amedure's trailer, where he confronted Amedure about the note. When Amedure

> just smiled at him, defendant walked out of the trailer, stating that he had to shut off his car. Instead, defendant retrieved the shotgun and returned to the trailer. Standing at the front door, defendant fired two shots into Amedure's chest, leaving him with no chance for survival. Defendant left the scene and telephoned 911 to confess to the shooting.

Following a jury trial, Schmitz was found guilty of second-degree murder and possession of a firearm during the commission of a felony; however, this Court reversed the conviction and remanded the case for a new trial on the basis of an error concerning peremptory challenges and jury selection. *Schmitz, supra.* On remand, Schmitz was again found guilty of second-degree murder and felony-firearm and sentenced to twenty-five to fifty years' imprisonment for the murder conviction. His conviction and sentence were affirmed by this Court in *People v Schmitz*, unpublished opinion per curiam of the Court of Appeals, issued January 22, 2002, 2002 Mich. App. LEXIS 71, (Docket No. 222834).

In the wrongful death action now before this Court, plaintiffs Patricia Graves and Frank Amedure, Sr., as personal representatives of the estate of Scott Amedure, deceased, alleged that Schmitz shot and killed Amedure as a direct and proximate result of the actions of the present defendants, the Jenny Jones Show (the show), its owner, Warner Bros., and its producer, Telepictures.[1] Plaintiffs essentially contended that defendants "ambushed" Schmitz

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[1] Jonathan Schmitz, the sole original defendant in this case before plaintiffs amended their complaint to add the present defendants, was dismissed from the suit as a result of a settlement agreement.

when they taped the episode of the show in question,[2] intentionally withholding from Schmitz that the true topic of the show was same-sex crushes and never attempting to determine, before the show, the effect the ambush might have on Schmitz. Plaintiffs alleged that defendants knew or should have known that their actions would incite violence, with the sole purpose of the show being the increase in television ratings, and that defendants had an affirmative duty to prevent or refrain from placing plaintiffs' decedent in a position that would unnecessarily and unreasonably expose him to the risk of harm, albeit the criminal conduct of a third person. Plaintiffs maintained that the show breached its duty and foreseeably subjected plaintiffs' decedent to an unreasonable risk of harm, ultimately resulting in his death.

Defendants' motions for summary disposition and a directed verdict were denied by the trial court, which opined that there were genuine issues of material fact regarding duty and foreseeability, negligence, and causation. Following extensive trial proceedings, a jury returned a verdict in plaintiffs' favor, and a judgment was subsequently entered thereon awarding plaintiffs $29,332,686 in damages. The trial court denied defendants' posttrial motion for judgment notwithstanding the verdict or, in the alternative, a new trial or remittitur. Defendants now appeal.

II

In defendants' first issue on appeal, we are confronted with the cornerstone of this case - whether defendants owed a duty to plaintiffs' decedent to protect him from harm caused by the criminal acts of a third party, Jonathan Schmitz.

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[2] The taped segment was never broadcast.

Defendants argue that they owed no such duty and that the trial court erred in denying defendants relief as a matter of law where plaintiffs failed to show a duty to prevent Schmitz' violent conduct. We agree.

Motions for summary disposition, a directed verdict, and judgment notwithstanding the verdict are reviewed de novo. *Badalamenti v Beaumont Hosp*, 237 Mich. App. 278, 284; 602 N.W.2d 854 (1999); *Meagher v Wayne State Univ*, 222 Mich. App. 700, 708; 565 N.W.2d 401 (1997); *Turner v Mercy Hosps & Health Services of Detroit*, 210 Mich. App. 345, 348; 533 N.W.2d 365 (1995); *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich. App. 785, 792; 369 N.W.2d 223 (1985).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. Under subsection C(10), a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. The trial court should grant the motion if the affidavits or other documentary evidence show that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), and (G)(4). *Maiden v Rozwood*, 461 Mich. 109, 120; 597 N.W.2d 817 (1999); *Quinto v Cross & Peters Co*, 451 Mich. 358; 547 N.W.2d 314 (1996).

In reviewing a trial court's decision on a motion for a directed verdict, this Court must examine the evidence and all reasonable inferences that may be drawn from it in a light most favorable to the nonmoving party. *Clark v Kmart Corp*, 465 Mich. 416, 418; 634 N.W.2d 347 (2001); *Mason v Royal Dequindre, Inc*, 455 Mich. 391, 397; 566 N.W.2d 199 (1997). Only if the evidence so viewed fails to establish a

claim as a matter of law should the motion be granted *Clark, supra* 465 Mich. at 418-419. The same standard applies in reviewing motions for judgment notwithstanding the verdict. *Orzel v Scott Drug Co*, 449 Mich. 550, 557-558; 537 N.W.2d 208 (1995).

Questions about whether a duty exists are for the court to decide as a matter of law. *Mason, supra; Murdock v Higgins*, 454 Mich. 46, 53; 559 N.W.2d 639 (1997); *Scott v Harper Recreation, Inc*, 444 Mich. 441, 448; 506 N.W.2d 857 (1993). The fundamental principles concerning the threshold issue of duty in a negligence action are well established and have been set forth in detail on numerous occasions by our courts. *See, generally, Case v Consumers Power Co*, 463 Mich. 1, 6; 615 N.W.2d 17 (2000); *Maiden, supra*; *Murdock, supra*; *Buczkowski v McKay*, 441 Mich. 96, 100-101; 490 N.W.2d 330 (1992); *Friedman v Dozorc*, 412 Mich. 1, 22; 312 N.W.2d 585 (1981); *Moning v Alfono*, 400 Mich. 425, 437; 254 N.W.2d 759 (1977); *Krass v Tri-County Security, Inc*, 233 Mich. App. 661, 667-668; 593 N.W.2d 578 (1999); *Baker v Arbor Drugs, Inc*, 215 Mich. App. 198, 203; 544 N.W.2d 727 (1996). Briefly reiterated, a negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. *Maiden, supra* at 131-132. This analysis requires a determination whether the relationship of the parties is the sort that a legal obligation should be imposed on one for the benefit of another. *Id.*; *Friedman, supra.* In determining whether a duty exists, courts examine different variables, including

> foreseeability of the harm, existence of a relationship between the parties involved, degree of certainty of injury, closeness of connection between the conduct

> and the injury, moral blame attached to the conduct, policy of preventing future harm, and the burdens and consequences of imposing a duty and the resulting liability for breach. [*Krass, supra* at 668-669.

See also Buczkowski, supra at 100-101; *Terry v Detroit*, 226 Mich. App. 418, 424; 573 N.W.2d 348 (1997).

Of particular import to the present appeal is the principle that, in general, there is no legal duty obligating one person to aid or protect another. *Krass, supra* at 668. Moreover, an individual has no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party. *Murdock, supra* at 54; *Buczkowski, supra* at 103-104; *Smith v Jones*, 246 Mich. App. 270, 275; 632 N.W.2d 509 (2001); *Krass, supra* at 668-669; *Marcelletti v Bathani*, 198 Mich. App. 655, 664; 500 N.W.2d 124 (1993). The rationale underlying this general rule is the fact that "[c]riminal activity, by its deviant nature, is normally unforeseeable." *Papadimas v Mykonos Lounge*, 176 Mich. App. 40, 46-47; 439 N.W.2d 280 (1989). Our Court in *Papadimas*, *id.* at 47, quoting Prosser & Keeton, Torts (5th ed), § 33, p 201, emphasized that "'[u]nder all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law.'" As further explained by our Supreme Court in *Williams v Cunningham Drug*, 429 Mich. 495, 498-499; 418 N.W.2d 381 (1988),

> In determining standards of conduct in the area of negligence, the courts have made a distinction between misfeasance, or active misconduct causing personal injury, and nonfeasance, which is passive

> inaction or the failure to actively protect others from harm. The common law has been slow in recognizing liability for nonfeasance because the courts are reluctant to force persons to help one another and because such conduct does not create a new risk of harm to a potential plaintiff. Thus, as a general rule, there is no duty that obligates one person to aid or protect another.
>
> Social policy, however, has led the courts to recognize an exception to this general rule where a special relationship exists between a plaintiff and a defendant. . . . The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety.

See also Ross v Glaser, 220 Mich. App. 183, 186-187; 559 N.W.2d 331 (1996); Restatement of Torts, 2d, § 315, p 122.

"Such a special relationship must be sufficiently strong to require a defendant to take action to benefit the injured party." *Murdock, supra* at 54. Examples of the requisite "special relationship" recognized under Michigan law include a common carrier that may be obligated to protect its passengers, an innkeeper his guests, an employer his employees, owners and occupiers of land their invitees, a doctor his patient, and business invitors or merchants their business invitees. *Id.*; *Buczkowski, supra* at 103-104; *; Krass, supra* at 670-671; *Marcelletti, supra* at 664; *Bell & Hudson, PC v Buhl Realty Co*, 185 Mich. App. 714, 718; 462 N.W.2d 851 (1990); *Moore v St. Joseph Nursing Home, Inc*,

184 Mich. App. 766, 768; 459 N.W.2d 100 (1990). In this context, our courts have established a duty of reasonable care toward only those parties who are "'readily identifiable as [being] foreseeably endangered.'" *Mason, supra* at 398, quoting *Murdock, supra* at 58. *See also Jenks v Brown*, 219 Mich. App. 415, 421; 557 N.W.2d 114 (1996); *Marcelletti, supra* at 665. As the *Mason* Court noted, "'Readily' is defined as 'promptly; quickly; easily.'" *Mason, supra* at 398, quoting *The Random House College Dictionary* (rev ed).

In its most recent pronouncement in this regard, our Supreme Court, in *MacDonald v PKT, Inc*, 464 Mich. 322; 628 N.W.2d 33 (2001), revisited the issue of a merchant's duty to protect business invitees from the criminal acts of third parties and substantially narrowed the scope of the duty owed by a premises owner to his invitee. The plaintiff in *MacDonald* brought an action against the defendant PKT, Inc. (Pine Knob), for injuries suffered during a concert at the defendant's theater as a result of sod being thrown by other concertgoers. She alleged that the defendant was negligent in failing to provide proper security, failing to stop the performance when it should have known that continuing the performance would incite the crowd, failing to screen the crowd to eliminate intoxicated individuals, and by selling alcoholic beverages. The Court held that merchants have a duty to respond reasonably to situations occurring on their premises that pose a risk of imminent and foreseeable harm to identifiable invitees; however, the duty to respond is limited to reasonably expediting the involvement of the police, and there is no duty to otherwise anticipate and prevent the criminal acts of third parties. The Court stated in pertinent part:

To summarize, under *Mason* [*v Royal Dequindre, Inc, supra*], *generally merchants "have a duty to use reasonable*

care to protect their identifiable invitees from the foreseeable criminal acts of third parties." Id. at 405. The duty is triggered by specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee. Whether an invitee is readily identifiable as being foreseeably endangered is a question for the factfinder if reasonable minds could differ on this point. *a See id.* at 404-405. *While a merchant is required to take reasonable measures in response to an ongoing situation that is taking place on the premises, there is no obligation to otherwise anticipate the criminal acts of third parties.* Consistent with *Williams* [*v Cunningham, supra],* a merchant is not obligated to do anything more than reasonably expedite the involvement of the police. We also reaffirm that a merchant is not required to provide security guards or otherwise resort to self-help in order to deter or quell such occurrences. *Williams, supra.* [*MacDonald, supra* at 338 (emphasis added).]

The *MacDonald* Court, *id.* at 334, n 10, expressly overruled that portion of *Mason* that indicated that a merchant has a duty to take precautions against the criminal conduct of third persons that may be reasonably anticipated. The Court explained that

> a merchant has no obligation generally to anticipate and prevent criminal acts against its invitees. . . .[W]e have never recognized as "foreseeable" a criminal act that did not . . . arise from a situation occurring on the premises under circumstances that would cause a person to recognize a risk of imminent and foreseeable harm to an identifiable invitee. Consequently, a merchant's only duty is to *respond* reasonably to such a situation. To hold otherwise would mean that merchants have an obligation to provide what amounts to police protection . . . .

A premises owner's duty is limited to responding reasonably to situations occurring on the premises because, as a matter of public policy, we should not expect invitors to assume that others will disobey the law. *A merchant can assume that patrons will obey the criminal law. See People v Stone*, 463 Mich. 558, 565; 621 N.W.2d 702 (2001), citing Prosser & Keeton, Torts (5th ed), § 33, p 201; *Robinson v Detroit*, 462 Mich. 439, 457; 613 N.W.2d 307 (2000); *Buczkowski v McKay*, 441 Mich. 96, 108, n 16; 490 N.W.2d 330 (1992); *Placek v Sterling Hts*, 405 Mich. 638, 673; 275 N.W.2d 511, n 18 (1979). *This assumption should continue until a specific situation occurs on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee. It is only a present situation on the premises, not any past incidents, that creates a duty to respond.*

Subjecting a merchant to liability solely on the basis of a foreseeability analysis is misbegotten. Because criminal activity is irrational and unpredictable, it is in this sense invariably foreseeable everywhere. However, even police, who are specially trained and equipped to anticipate and deal with crime, are unfortunately unable universally to prevent it. This is a testament to the arbitrary nature of crime. Given these realities, it is unjustifiable to make merchants, who not only have much less experience than the police in dealing with criminal activity but are also without a community deputation to do so, effectively vicariously liable for the criminal acts of third parties. 464 Mich. at 335 (emphasis in original and added).

MacDonald confirms the long-established rule that there is no general duty to anticipate and prevent criminal activity even where, unlike the present case, there have been prior incidents and the site of the injury is a business premises. Any duty is limited to reasonably responding to situations that occur on the premises and pose a risk of imminent and foreseeable harm to identifiable invitees, and the duty to respond is limited to contacting the police.

Logic compels the conclusion that defendants in this case had no duty to anticipate and prevent the act of murder committed by Schmitz three days after leaving defendants' studio and hundreds of miles away. Here, the only special relationship, if any, that ever existed between defendants and plaintiffs' decedent, or between defendants and Schmitz, was that of business invitor to invitee. However, any duty ends when the relationship ends, *MacDonald, supra*; *Murdock, supra* at 54-55; *Williams*, supra; Restatement of Torts, 2d, § 314A, comment c, p 119, and in this instance the invitor/invitee relationship ended on March 6, 1995, three days before the murder, when Schmitz and Amedure peacefully left the Chicago studio following the taping of the episode. Because the evidence, even when viewed from a perspective most favorable to plaintiffs, revealed no ongoing special relationship at the time of the murder,[3] defendants

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[3] Plaintiffs argue that the special relationship between defendants and Schmitz and Amedure did not end when Schmitz and Amedure left the show. Plaintiffs analogize to a dramshop action, in which a bar may be held liable for a drunk-driving accident after improperly serving alcoholic beverages to a drunk driver even though the driver at the time of the accident was no longer on the premises. However, a dram shop action is statutory in nature and involves serving liquor to a visibly intoxicated person.

owed no duty to protect plaintiffs' decedent from Schmitz' violent attack on March 9, 1995. The present situation simply cannot, under any reasonable interpretation of the circumstances, be construed as involving an existing special relationship that required defendants to respond to a risk of imminent and foreseeable harm to an identifiable invitee on the premises. *MacDonald*, *supra*. Consequently, the trial court erred as a matter of law in denying defendants' motions for summary disposition, a directed verdict, and judgment notwithstanding the verdict on the basis of lack of duty, an essential element of any negligence action. *Maiden*, *supra*; *Buczkowski*, *supra*.

Plaintiffs seek to characterize the case as one involving misfeasance, alleging that it was reasonably foreseeable that defendants' conduct both in creating and taping an episode on the topic of same-sex crushes and in actively creating a volatile situation would cause Schmitz to murder Amedure. A duty may be imposed in cases of alleged misfeasance where, notwithstanding the general rule that criminal conduct is unforeseeable as a matter of law, the third party's criminal conduct is a reasonably foreseeable consequence of the defendant's actions under the particular circumstances of the case. *See*, *generally*, *Williams*, *supra* 429 Mich. at 498; *Ross*, *supra* 220 Mich. at 187; Restatement of Torts, 2d, § 302B, p 88, and § 314A, p 118. However, here, we agree with defendants that such a rationale is wholly unavailing. As previously noted, "[c]riminal activity, by its deviant nature, is normally unforeseeable," *Papadimas*, *supra* at 46-47, and thus "'[u]nder all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may

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In this case, Schmitz was neither visibly upset nor dangerous during the taping of the show.

reasonably proceed upon the assumption that others will obey the criminal law.'" *Id.*, quoting Prosser, § 33, p 201. This case presents no exceptional circumstances warranting departure from that general rule because the evidence at trial disclosed no "reason to expect the contrary" here. Schmitz gave every appearance of being a normal, well-adjusted adult who consented to being surprised on the show by a secret admirer of unknown sex and identity. The evidence of record indicates that nothing in Schmitz' demeanor, or in any of his interactions with the show, put defendants on notice that he posed a risk of violence to others.[4] Reasonable foreseeability is a necessary prerequisite to any finding of a duty under Michigan law. *Buczkowski*, *supra*; *cf. Groncki v Detroit Edison Co*, 453 Mich. 644, 657; 557 N.W.2d 289 (1996) (opinion by Brickley, C.J.). Viewed from a perspective most favorable to plaintiffs, the evidence failed to establish a jury question regarding whether it was reasonably foreseeable that Schmitz would murder Amedure as the natural and probable

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[4] In this regard, the present case differs substantially from *Ross*, *supra*, in which a divided panel of this Court found a duty to protect against the criminal acts of a third party based on a theory of misfeasance. The *Ross* majority focused on the defendant's actual knowledge that his son suffered from chronic mental problems and of a history of conflicts between his son and some neighbors. In those circumstances, the defendant's decision to hand his son a loaded gun at the moment one such conflict was flaring up was found to entail a foreseeable risk of injury. *Id.* 220 Mich. at 188. The *Ross* Court expressly distinguished *Buczkowski, supra,* on the ground that in *Buczkowski*, as here, "there was no evidence that the customer acted in a threatening manner or was legally incompetent." 220 Mich. App. at 189. The Court also relied on the "proximity in time between defendant's conduct and the shooting," *id.*, explaining that the shooting occurred "just minutes after defendant handed [his son] a loaded gun," 220 Mich. App. at 193, not days later and a long distance away as in the instant case.

result of the events on the show. Accordingly, the trial court should have ruled that the murder was not foreseeable as a matter of law and entered judgment in favor of defendants. *See Buczkowski*, *supra* at 108, n 16 (emphasizing that because there was no evidence of actual notice of "abnormal behavior," the "retailer [who sold ammunition to an allegedly intoxicated person] was entitled to proceed on the assumption that the purchaser would obey the criminal law"), and *Johnson v Detroit*, 457 Mich. 695, 712; 579 N.W.2d 895 (1998) (opinion by Mallett, C.J.) ("defendants could not have suspected that the decedent [who committed suicide in a police station holding cell by using exposed overhead bars that originally had been covered with mesh but were exposed because the mesh had been torn away and had not been repaired despite knowledge of the problem by the police] was suicidal. Consequently, there was no duty to prevent this unforeseeable death."). To impose a duty based on a misfeasance theory under the circumstances at hand would expand the concept of duty to limitless proportions.

III

Finally, to the extent the torts of misrepresentation and intentional infliction of emotional distress were either pleaded as alternative theories of recovery or incorporated into the cause of action, over defendants' objection, by the trial court's jury instructions, we conclude that such claims must fail as a matter of law. Amedure's estate cannot recover under the separate tort of intentional misrepresentation, based on defendants' alleged statements to Schmitz, a third party. *Hi-Way Motor Co v International Harvester Co*, 398 Mich. 330,

336; 247 N.W.2d 813 (1976).[5] The elements of intentional infliction of emotional distress are similarly lacking. *See Roberts v Auto-Owners Ins Co*, 422 Mich. 594, 602; 374 N.W.2d 905 (1985). The mental distress that is the subject of this case was allegedly inflicted on Schmitz, a nonparty to this appeal, not on plaintiffs' decedent. Therefore, this count could not be sustained as a matter of law.

IV

In sum, we conclude that defendants owed no duty as a matter of law to protect plaintiffs' decedent from the intentional criminal acts of a third party, Jonathan Schmitz, that occurred three days after the taping of the Jenny Jones Show. While defendants' actions in creating and producing this episode of the show may be regarded by many as the epitome of bad taste and sensationalism, such actions are, under the circumstances, insufficient to impute the requisite relationship between the parties that would give rise to a legally cognizable duty. The trial court therefore erred in denying defendants' motions in this regard. Because we find no antecedent duty, we need not address the other issues raised by defendants on appeal. Accordingly, we reverse the judgment, vacate the order, and remand to the trial court with directions that it enter a judgment and order in favor of defendants.

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[5] Moreover, assuming the alleged misrepresentation was not a separate cause of action but rather a manifestation of plaintiffs' negligence claim, as already noted, no ongoing special relationship existed between defendants and Amedure on the day of the unforeseeable murder; thus, defendants owed no duty to prevent Schmitz' criminal conduct.

Judgment reversed, order vacated, and case remanded. We do not retain jurisdiction.

Meter, J., concurred.

/s/ Richard Allen Griffin

/s/ Patrick M. Meter

DISSENT: MURPHY, P.J. (*dissenting*).

I respectfully dissent from the majority's opinion because the issue of foreseeability concerning the shotgun slaying was properly placed in the hands of the jury. Viewing the evidence in a light most favorable to plaintiffs, I believe that the issue was properly left to the jury where the evidence indicated that Jonathan Schmitz was humiliated and devastated on a show scheduled to be broadcast[1] on national television by defendants through the revelation of a homosexual crush and lurid sexual fantasy by Scott Amedure after Schmitz told defendants that he did not want the crush to be that of another man, and where defendants nonetheless proceeded with the production of the show, using deceit, sensationalism, and outrageous behavior. I reach my conclusion taking into consideration Schmitz' personal history, which included mental illness, alcohol and drug abuse, suicide attempts, anger management problems, and sexual identity concerns. Certainly, reasonable men and women could differ on whether Schmitz' violent act foreseeably resulted from defendants' actions in manipulating and exploiting the lives, emotions, and

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[1] Although the taped segment was never broadcast, presumably because of the tragic event that unfolded, it is clear from the record that Schmitz anticipated that it would be.

sexual identities of individuals for the purpose of producing their television talk show.[2]

The existence of a legal duty in a negligence action is a question of law that this Court reviews de novo. *Cipri v Bellingham Frozen Foods, Inc.* 235 Mich. App. 1, 14; 596 N.W.2d 620 (1999). However, where there are factual circumstances that give rise to a legal duty, the existence or nonexistence of those facts must be decided by a jury. *Aisner v Lafayette Towers*, 129 Mich. App. 642, 645; 341 N.W.2d 852 (1983). Whether the risk of harm from third-party criminal activity is foreseeable in a particular case is generally a question of fact for the jury. *Holland v Liedel*, 197 Mich. App. 60, 63; 494 N.W.2d 772 (1992). Although the question of duty is ordinarily one of law to be decided by the court, where a determination of duty depends on factual findings, those findings must be found by the jury. 197 Mich. App. at 65.

Defendants' arguments regarding duty arose below in the context of defendants' motions for summary disposition, a directed verdict, and judgment notwithstanding the verdict (JNOV). Each of those motions is reviewed de novo by this Court. *Spiek v Dep't of Transportation*, 456 Mich. 331, 337; 572 N.W.2d 201 (1998); *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich. App. 670, 679; 645 N.W.2d 287

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[2] Although Schmitz first declined to appear on the show, he subsequently decided to appear because, in part, he believed that there was a chance he could meet the love of his life or get back together with his ex-girlfriend.

(2001); *Morinelli v Provident Life & Accident Ins Co*, 242 Mich. App. 255, 260; 617 N.W.2d 777 (2000).[3]

In *Terry v Detroit*, 226 Mich. App. 418, 424; 573 N.W.2d 348 (1997), this Court outlined the following general principles concerning a negligence action:

> In order to establish a prima facie case of negligence, the plaintiff must prove: "(1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach of duty was a proximate cause of the plaintiff's damages; and (4) that the plaintiff suffered damages." *Baker v Arbor Drugs*, Inc. 215 Mich. App. 198, 203; 544 N.W.2d 727 (1996). Duty is an obligation that the defendant has to the plaintiff to avoid negligent conduct. *Id.* Whether a duty exists is a question of law for the court. *Simko v Blake*, 448 Mich. 648, 655; 532 N.W.2d 842 (1995). If a court determines as a matter of law that a defendant owed no duty to a

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[3] In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich. 109, 120; 597 N.W.2d 817 (1999). In a motion under subsection C(8), all factual allegations in support of the claim are accepted as true and construed in a light most favorable to the nonmoving party. 461 Mich. at 119. The test for evaluating a motion for a directed verdict and JNOV is identical. *Smith v Jones*, 246 Mich. App. 270, 273-274; 632 N.W.2d 509 (2001). The evidence and all legitimate inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Wilkinson v Lee*, 463 Mich. 388, 391; 617 N.W.2d 305 (2000).

plaintiff, summary disposition is appropriate under MCR 2.116(C)(8). *Dykema v Gus Macker Enterprises, Inc*[,] 196 Mich. App. 6, 9; 492 N.W.2d 472 (1992).

In determining whether a duty exists, courts look to different variables, including the (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. *Buczkowski* [*v McKay*, 441 Mich. 96, 101; 490 N.W.2d 330 (1992)], citing Prosser & Keeton, Torts (5th ed), § 53, p 359, n 24; *Baker*, *supra*.

One of the initial difficulties in addressing the issues presented in this case is the development of the proper analytical framework. In *Babula v Robertson,* 212 Mich. App. 45, 52; 536 N.W.2d 834, n 2 (1995), this Court, quoting *Moning v Alfono*, 400 Mich. 425, 437-438; 254 N.W.2d 759 (1977), stated:

"'Duty' comprehends whether the defendant is under *any* obligation to the plaintiff to avoid negligent conduct; it does not include--where there is *an* obligation--the nature of the obligation: the general standard of care and the specific standard of care. . . . While the court decides questions of duty, general standard of care and proximate cause, the jury decides whether there is cause in fact and the specific standard of care: whether defendants' conduct in the particular

> case is below the general standard of care, including--unless the court is of the opinion that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy--whether in the particular case the risk of harm created by the defendants' conduct is or is not reasonable." [Emphasis in original.]

The *Babula* panel noted that the questions of duty and proximate cause are interrelated because the question whether there is the requisite relationship, giving rise to a legal duty, and the question whether the cause is so significant and important as to be regarded a proximate cause both depend in part on foreseeability. *Babula*, *supra* at 53.

The first matter that needs to be addressed in properly analyzing the duty issue is whether plaintiffs' action is premised on nonfeasance or misfeasance. I specifically disagree with that portion of the majority's opinion that implicitly focuses on the concept of nonfeasance and the necessarily incorporated principles concerning the duty to protect and the necessity of a special relationship. Such an analysis is inapplicable in this case, a case of misfeasance, not nonfeasance.

In *Ross v Glaser*, 220 Mich. App. 183, 184-185; 559 N.W.2d 331 (1996), the personal representative of the decedent's estate brought suit against the father of an adult son after the son, who had a history of mental illness, shot the decedent with a gun provided by the father, which gun was given to the son while he was in an agitated state. This Court reversed the trial court's order granting summary disposition to the defendant. 220 Mich. App. at 184. The *Ross* panel, distinguishing misfeasance from nonfeasance, stated:

In this case, defendant argues that he has no duty to control the conduct of third parties absent a special relationship to them, particularly when the conduct is criminal. He asserts that the father-son relationship is insufficient to establish the required special relationship that would impose a duty on him.

The argument is unavailing. Michigan courts have distinguished active misconduct causing personal injury (misfeasance) and passive inaction or the failure to protect others from harm (nonfeasance). Generally, with respect to nonfeasance, there is no legal duty that obligates a person to aid or protect another. An exception has developed where a special relationship exists between the persons.

However, defendant's act of handing a loaded gun to [his son] was not one of nonfeasance, but rather misfeasance. Therefore, the special relationship doctrine is inapplicable . . . . Instead, we must determine whether defendant had a duty to refrain from handing [his son] a loaded weapon.

* * *

As to foreseeability, we determine whether it is foreseeable that the conduct may create a risk of harm to the victim and whether the result and intervening causes were foreseeable. [*Id Ross*, *supra* at 186-187 (citations omitted).]

The *Ross* panel concluded that summary disposition was improper because the likelihood of injury was high where the mentally ill son was handed a loaded gun while in an agitated state and in conflict with antagonists. *Id.* at 189. *Ross* makes clear that principles regarding the duty to protect another from

the criminal acts of third parties and the necessity of a special relationship do not apply in cases of misfeasance.

The essence of plaintiffs' case is premised on misfeasance, or active misconduct, as opposed to nonfeasance or passive inaction, which would require a special relationship, because plaintiffs challenged defendants' actions in producing the same-sex crush show.[4] Plaintiffs were not asserting liability based on defendants' failure to properly respond to Schmitz' pointing a shotgun at Amedure or failure to actively protect Amedure from Schmitz' actions, nor, on close inspection, is plaintiffs' action premised on defendants' failure to anticipate or prevent Schmitz' criminal act. Rather, plaintiffs' action focuses on defendants' active misconduct *that allegedly created a risk of foreseeable harm* to Amedure, which conduct included lies, deceit, and outrageous behavior. Although it is true that certain aspects of plaintiffs' claims involved inaction, such as the failure to check into Schmitz' background, the

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[4] Defendants argue in their reply brief that plaintiffs did not request a jury instruction based on misfeasance, nor did the trial court ever rule that alleged misfeasance was an appropriate basis for imposing liability. Defendants' argument lacks merit. The trial court and plaintiffs continually referred to this case as a simple negligence case, or a "classic case of negligence." The trial court denied the initial motion for summary disposition, in part, because plaintiffs alleged that the show *actively created a volatile situation.* In its instructions, the court instructed the jury: "Therefore, by 'negligence,' I mean the failure to do something that a reasonably careful television production company would do, or *the doing of something* that a reasonably careful television production company would not do under the circumstances that you find existed in this case." Moreover, plaintiffs sought instructions regarding affirmative acts, e.g., misrepresentation and intentional infliction of emotional distress.

claims are all in the context of the manner in which the show was produced, which is a matter of active misconduct.

The majority mistakenly relies on *MacDonald v PKT, Inc*, 464 Mich. 322; 628 N.W.2d 33 (2001), in support of its position. *MacDonald, id.* at 345, specifically reaffirmed our Supreme Court's earlier decision in *Williams v Cunningham Drug Stores, Inc.* 429 Mich. 495; 418 N.W.2d 381 (1988), in which the Supreme Court stated:

> In determining standards of conduct in the area of negligence, the courts have made a distinction between misfeasance, or active misconduct causing personal injury, and nonfeasance, which is passive inaction or the failure to actively protect others from harm. The common law has been slow in recognizing liability for nonfeasance because the courts are reluctant to force persons to help one another and *because such conduct does not create a new risk of harm to a potential plaintiff.* [*Id Williams*, *supra* at 498 (emphasis added).]

In *MacDonald*, *supra* at 345-346[5], the Supreme Court, addressing the duty of premises owners concerning the criminal acts of third parties, held:

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[5] The Supreme Court noted the factual circumstances, stating that in these consolidated premises liability cases, plaintiffs seek to recover for injuries they suffered when fellow concertgoers at the Pine Knob Music Theater . . ., an outdoor amphitheater that offered seating on a grass-covered hill, began pulling up and throwing pieces of sod. We granted leave to address the duty of premises owners concerning the criminal acts of third parties. [*MacDonald*, *supra* at 325.

> [W]e conclude that merchants have a duty to respond reasonably to situations occurring on the premises that pose a risk of imminent and foreseeable harm to identifiable invitees. We hold that the duty to respond is limited to reasonably expediting the involvement of the police, and that there is no duty to otherwise anticipate the criminal acts of third parties. Finally, we affirm that merchants are not required to provide security personnel or otherwise resort to self-help in order to deter or quell such occurrences."

The Supreme Court additionally held that there is no duty to prevent the criminal acts of third parties. *Id.* at 326. The *MacDonald* Court did not hold that there was no duty to avoid actively creating a volatile situation that gives rise to a criminal act.

Defendants focus on the lack of any duty owed to Amedure. Based on the case law cited above, the determination whether defendants owed a duty to Amedure to avoid negligent conduct depended on the conduct at issue in relation to the harm claimed. In other words, the relevant inquiry in determining the existence of a duty is whether defendants should have refrained from producing and taping a same-sex crush show in the fashion it was done and under the circumstances presented, where plaintiffs asserted that the conduct caused physical harm and death to Amedure.[6] In determining whether defendants should have refrained from producing the same-sex crush show in light of the alleged harm, we must examine whether the harm was foreseeable in

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[6] In *Ross*, *supra 220 Mich.* at 187, this Court stated that "we must determine whether defendant had a duty to refrain from handing Anthony a loaded weapon."

that context. Reversal is mandated only if we can rule, as a matter of law and viewing the evidence in a light most favorable to plaintiffs, that a violent response by Schmitz was not foreseeable under the circumstances of this case.

A duty arises if events are foreseeable. *Groncki v Detroit Edison Co*, 453 Mich. 644, 657; 557 N.W.2d 289 (1996). "Criminal activity, by its deviant nature, is normally unforeseeable." *Papadimas v Mykonos Lounge, 176 Mich. App. 40, 46-47; 439 N.W.2d 280 (1989)* . The *Papadimas* panel, *id.* at 47, quoting Prosser & Keeton, Torts (5th ed), § 33, p 201, noted that "'under all ordinary and normal circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law.'" "It is not necessary that the manner in which a person might suffer injury be foreseen or anticipated in specific detail." *Ross*, *supra* 220 Mich. at 188.

Plaintiffs rely, in part, on *Pamela L v Farmer*, 112 Cal. App. 3d 206, 207-209, 169 Cal. Rptr. 282; (1980), where the California Court of Appeals reversed a summary disposition granted in favor of the defendant wife, where the wife knew of her defendant husband's history of molesting women and children when she encouraged and invited the plaintiff minors to use the swimming pool at her house and told the minors' parents that it was safe for their children to play at her house while she was at work and her husband was home. The court ruled, in part, that if the allegations were true, the wife could have been held to have unreasonably exposed the minors to harm. *Id.* at 211. The court also ruled that "where the defendant, through his or her own action (misfeasance) has made the plaintiff's position worse and has created a foreseeable risk of harm from the third person[,]" liability

may arise. *Id.* at 209. The principles enunciated in *Ross* parallel those in *Pamela L.*

Defendants rely on *Johnson v Detroit*, 457 Mich. 695, 697, 699-700; 579 N.W.2d 895 (1998), in which the decedent committed suicide in a police station holding cell through use of exposed overhead bars that originally had been covered by mesh but were exposed because the mesh had been torn away and had not been repaired. Although the defendant was aware of the need to repair the problem, it had failed to do so. Our Supreme Court, rejecting the plaintiff's negligence claim, stated:

> In her negligence claim, the plaintiff has to establish that the defendant had a duty to this particular decedent, that it breached that duty by placing the decedent in the defective cell, and that the breach was a proximate and factual cause of the decedent's death. A defendant does not owe a duty to an unforeseeable plaintiff. In this case, plaintiff failed to present a genuine issue of material fact establishing the existence of a duty owed to plaintiff's decedent because defendants were actually unaware, and it was not reasonably foreseeable, that the decedent was suicidal before placing him in the defective cell. . . .
>
> . . . Officers testified that the decedent gave no indication that he was suicidal. Conversely, the plaintiff presented nothing to refute this evidence and did not offer any evidence that the suicide was reasonably foreseeable.
>
> Where the events leading to injury are not foreseeable, there is no duty, and summary disposition is appropriate. *Groncki v Detroit Edison Co*, 453

> Mich. 644, 657; 557 N.W.2d 289 (1996). In this case, the defendants had no notice that the decedent might attempt suicide, and therefore they cannot be held responsible for failing to prevent the decedent's death. This death was not reasonably foreseeable. Tragic as it was, defendants cannot be held responsible for the unforeseen suicide of the plaintiff's decedent. [*Johnson, supra* at 711-712.]

Johnson leads to the issue whether Schmitz' personal history, which included depression, alcohol and drug abuse, suicide attempts, anger management problems, and sexual identity concerns, should be taken into account in determining whether a violent response was foreseeable, where there was no evidence that defendants knew about Schmitz' personal or psychiatric history.[7] The majority states, when it does reach the issue of misfeasance, that "Schmitz gave every appearance of being a normal, well-adjusted adult who consented to being surprised on the show by a secret admirer of unknown sex and identity." *Ante* at ___. For the most part, I agree with this statement.[8]

The matter presents a unique situation in the law regarding the foreseeability of third-party criminal acts because ordinarily one would not have the opportunity to look into the personal history of the criminal actor's life or even know who

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[7] This evidence was presented to the jury through the testimony of plaintiffs' experts and individuals with personal knowledge of Schmitz' life, including his ex-girlfriend with whom he had lived.

[8] There was some testimony presented that one of the show's producers was so annoyed by Schmitz' constant telephone calls before the show that if Schmitz called one more time, the producer would smack him.

the criminal actor was going to be before the negligent act occurred; however, here the show knew that it was going to surprise Jonathan Schmitz and cause some type of emotional reaction before it proceeded with its intentional act. In *Johnson, supra,* where the Supreme Court relied on the lack of notice of suicidal tendencies, the police did not have the opportunity or ability to review the decedent's background, let alone know his identity, in order to make an assessment of any suicidal tendencies before arresting him and putting him in the holding cell, and to require the police to do so would be unreasonable; they were only able to assess any suicidal tendencies on the basis of his interaction with the police at the time of the arrest. In *Ross* and *Pamela L, supra,* the defendants knew of the criminal actors' personal history because the actors were family members.

The question should not involve whether the show must be required or has a duty to make an inquiry into the background of a particular person, the failure of which may result in liability, but rather whether defendants should be charged with the knowledge of the actual history for the purpose of foreseeability analysis.

I would hold that as a matter of public policy, if defendants, for their own benefit, wish to produce "ambush" shows that can conceivably create a volatile situation, they should bear the risk if a guest is psychologically unstable or criminally dangerous by being charged with that knowledge in the context of any foreseeability analysis. "'Public policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Terrien v Zwit*, 467 Mich. 56, 68; 648 N.W.2d 602 (2002), quoting *Muschany v United States*, 324 U.S. 49, 66; 65 S. Ct. 442; 89 L. Ed. 744 (1945). Analogous legal precedents form the basis of my public policy position.

In *Richman v City of Berkley*, 84 Mich. App. 258, 261; 269 N.W.2d 555 (1978), this Court stated that it "is a basic tort rule of law--a tortfeasor takes his victim as he finds him." In a separate dissenting opinion in *Pierce v General Motors Corp*, 443 Mich. 137, 155-156; 504 N.W.2d 648 (1993), Justice Levin noted that all first-year law school students are taught that a tortfeasor takes his victim as he finds him as explained through the example of the man with an eggshell skull; one is responsible for the consequences of hitting a person on the head and cracking the skull even if the skull was weak to begin with and one gave only a slight blow as a joke. Finally, our Supreme Court in *Wilkinson v Lee*, 463 Mich. 388, 396-397; 617 N.W.2d 305 (2000), quoting with approval 2 Restatement Torts, 2d, § 461, p 502, and the accompanying comment, stated:

> "The negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct."
>
> "The rule stated in this Section applies not only where the peculiar physical condition which makes the other's injuries greater than the actor expected is not known to him, but also where the actor could not have discovered it by the exercise of reasonable care, or, indeed even where it is unknown to the person suffering it or to anyone else until after the harm is sustained. A negligent actor must bear the risk that his liability will be increased by reason of the actual physical condition of the other toward whom his act is negligent."

I would apply these principles by analogy to the case sub judice. Although Amedure, through his estate, was the "victim" for purposes of the instant action, the alleged misfeasance was also directed at Schmitz, and on the basis of the very unique circumstances of this case, defendants should take Schmitz *as they found him*, making it appropriate to consider Schmitz' personal history in determining foreseeability. To rule otherwise would allow television, radio, or other media outlets to undertake similar actions as occurred here without limit and claim lack of foreseeability in the face of a civil action because they lacked knowledge concerning the history of a person they set up for ridicule. The *Wilkinson* Court concluded that "the fact that this particular plaintiff was unusually vulnerable to head injuries does not relieve the defendants of responsibility for those damages." *Wilkinson*, *supra* at 397. Likewise, the fact that Schmitz was unusually vulnerable should not relieve defendants of their responsibility. For purposes of foreseeability analysis, defendants should be made to bear the risk where a guest is psychologically unstable or criminally dangerous and defendants acted intentionally in producing the show for their own benefit.

I am not asserting that defendants should not be allowed to produce shows of this kind, nor that they must be required to make inquiry into the personal backgrounds of guests (although an industry practice to make minimal inquiry could be beneficial to all), but only that if they wish to produce "ambush" shows through the exploitation of guests, they must take those guests as they are.[9]

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[9] If a show were to surprise a person about a spouse's infidelities, and the surprised spouse had a history of numerous convictions for felonious and brutal assaults against domestic

Considering the evidence in a light most favorable to plaintiffs, the show used lies, deceit, sensationalism, and outrageous behavior, while playing with human emotions, in order to orchestrate a grand surprise for the benefit of its audience and ratings, which caused Schmitz to suffer deep embarrassment, humiliation, and extreme anger. Taking into consideration Schmitz' personal mental frailties and dangerous inclinations, those circumstances could lead reasonable jurors to draw different conclusions regarding whether it was foreseeable that Schmitz would commit an act of violence against Amedure.[10] Therefore, resolution by the jury was appropriate.

In view of the majority's opinion to reverse on the basis of the "duty" issue, other than to record my disagreement with the analysis by the majority in this dissent, I see no value in attempting to address the other issues raised on appeal.

/s/ William B. Murphy

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partners, it would only be appropriate to attribute knowledge of that history to the producers of such a show where the unfaithful spouse is subsequently harmed by the surprised spouse because of the public revelation.

[10] The jury was also presented with expert testimony about the potential dangerous repercussions of producing shows of this nature and with testimony that warnings concerning these dangers were actually given to defendants before the taping of the show at issue.

APPENDIX E

STATE OF MICHIGAN

IN THE SUPREME COURT

Supreme Court Docket No: 122457

Court of Appeals Docket No: 227392

Lower Court No: 94-409216-NH

LINDA M. GILBERT, Plaintiff-Appellee,	)
vs.	)
DAIMLER CHRYSLER CORPORATION, Defendant-Appellant.	)

AFFIDAVIT OF GEOFFREY N. FIEGER IN SUPPORT OF MOTION FOR RECUSAL AND FOR EVIDENTIARY HEARING

STATE OF MICHIGAN)
)SS.
COUNTY OF OAKLAND)

GEOFFREY NELS FIEGER, being first duly sworn, deposes and says that:

1. Except as otherwise stated in this Affidavit, the contents are made on personal knowledge of which I can and will testify if called as a witness.

2. As to matters of which I do not have personal knowledge, I believe that the contents are true, based on information available to me, and can be proven at an evidentiary hearing.

3. I was trial counsel for Linda Gilbert, Plaintiff in the above-entitled case.

4. I have reviewed the Statement of Facts of the Brief filed in support of the Motion for Recusal and for Evidentiary Hearing and, to the best of my information, knowledge and belief, all factual statements therein are true.

5. A verdict and Judgment have been obtained in favor of my client, Linda Gilbert, against Defendant Daimler Chrysler.

6. On appeal, the Court of Appeals affirmed the verdict and Judgment for Linda Gilbert [#227392, unpublished *per curiam* Opinion released 7/30/02; Hon. William C. Whitbeck, Hon. Jane Markey; Hon. Thomas Fitzgerald], and denied Defendant's Motion for Rehearing [Order of 9/12/02].

7. My law firm, and through it I personally, have an economic interest in the outcome of the pending Application pursuant to a contingent fee agreement and the attorney fee recovery allowed in an action under the Elliott-Larsen Civil Rights Act by MCLA 37.2802.

8 Neither the Michigan Chamber of Commerce nor the United States Chamber of Commerce participated or sought to participate in this case in the trial court or Court of Appeals.

9. Both the Michigan Chamber of Commerce and United States Chamber of Commerce have filed proposed *Amicus Curiae* Briefs in this Court in support of Defendant Daimler Chrysler, which has been identified as a member of each.

10. According to published reports, the Michigan Chamber of Commerce donated over $3,000,000, advertising or other things of value worth that amount, to the 2000 election campaigns of Justices Markman, Taylor and Young.

11. Additionally, Mr. LaBrant, the author of the proposed *Amicus* Brief of Michigan Chamber of Commerce, is credited with creation of a widely published advertisement, known as the "**my dancing tree**" ad which contributed to the election of Justices Markman, Taylor and Young in 2000.

12. Moreover, at about the time it filed its proposed *Amicus* Brief, in the fall of 2002, the Michigan Chamber of Commerce financed a massive public television ad campaign endorsing Justices Weaver and Young.

13. By this course of conduct, the Michigan Chamber of Commerce, which had no participation in this case in the lower courts, has asked this Court to benefit its member, Defendant Daimler Chrysler, after having publicly financed multi-million campaign donations to or for a majority of the members of this Court (Justices Markman, Young, Taylor and Weaver).

14. By Order of April 8, 2003, with no indication of recusal or dissent from Justices Corrigan, Markman, Weaver, Young, or Taylor, the Court did what the Michigan Chamber requested: permit it to participate as *Amicus Curiae* and grant leave to appeal to its member, Defendant Daimler Chrysler.

15. I sincerely believe that it would minimally create an appearance of impropriety for Justices Markman, Taylor, Young and Weaver to participate in deciding this appeal on its substantive merits after publicly receiving a multi-million dollar benefit from Defendant Daimler Chrysler's *Amicus* supporters, which are groups to which it belongs.

16. I also sincerely believe that public campaign contributions of this magnitude necessarily give rise to a bias, prejudice, or predisposition on the part of Justices Markman, Young, Weaver and Taylor to benefit Defendant, whose organiza-tion contributed to the campaigns by which these Justices attained or retained their seats on this Court.

17. I was the nominee of the Democratic Party for the office of Governor of the State of Michigan in the 1998 election.

18. My principal opponent in that election was Governor John Engler.

19. During that campaign, and on other occasions, Governor Engler and I have been very critical of each other publicly.

20. In 1993, on a statewide broadcast radio station, Governor Engler advocated my disbarment as a means of

preventing conduct of my client, Dr. Kevorkian, that Governor Engler found objectionable.

21. During the campaign, and during the term of office of Governor Engler, the wife of Justice Taylor has been on the staff of Governor Engler as legal counsel to the Governor.

22. I have been told that Governor Engler lived with Justice Taylor and his wife at a time when he was separated or divorced from his first wife, Colleen Engler.

23. Justices Taylor, Corrigan, Young and Markman have been appointed to the Court of Appeals and/or Supreme Court by Governor Engler and, to that extent, owe their judicial offices to my critic and former adversary, Governor Engler.

24. In an apparent effort to kindle or rekindle among these Justices antipathy, bias, or prejudice to me, Defendant Daimler Chrysler has presented to this Court, as Exhibits to its Application, materials regarding the 1998 gubernatorial campaign.

25. I believe that these filings by Defendant Daimler Chrysler were intended to, and may in fact, kindle or rekindle bias, prejudice or antipathy, toward me by Justices Corrigan, Taylor, Young and Markman.

26. This concern is enhanced by the public statements about me by Justice Young, who is reported as believing that I "hate this court", and that he personally believes that there is, "honor in that" hate ["Geoffrey Fieger and his trial lawyer cohorts hate this Court. There's honor in that"].

27. My concerns are further enhanced by the public statements of Justice Markman, who regards those who represent plaintiffs in medical malpractice cases, like myself, as his opponent ("Our opponents, the people who quite frankly make a liveli-hood suing [doctors]. . .").

28. Additionally, Justice Taylor has publicly made statements regarding my economic interest in certain cases, including this case particularly ("Geoffrey Fieger . . . has $90 million of lawsuit awards pending in the State Court of Appeals").

29. Justice Corrigan has even initiated a Request for Investigation, which has since been dismissed, by which she threatened the loss of my license to practice law, the event advocated by Governor Engler in 1993. Further, Justice Corrigan's husband, now deceased, wrote numerous articles published in newspapers critical of me and my representation of Dr. Kevorkian. She has previously disqualified herself from a case involving Dr. Kevorkian after this issue was raised.

30. In view of these circumstances and others detailed hereafter, I sincerely believe that Justices Corrigan, Markman, Young and Taylor harbor a predisposition of bias or prejudice against me personally.

31. I further believe that it would minimally create the appearance of impropriety for these Justices to participate in this appeal after having attacked me personally.

32. My concerns and beliefs are enhanced because of the public nature of these criticisms and announced predispositions, and by the fact that these statements (other than the Request for Investigation by Justice Corrigan) were

made in the context of a political campaign by which the statements were ostensibly made to curry electoral favor by suggesting a predisposition to rule adverse to me and my clients.

33. I am aware of other examples of public political advertisements on behalf of Justices Markman, Taylor and Young targeting me personally, in their successful 2000 campaign for the offices they now occupy.

34. These statements were made even though I was not a candidate for public office during that election, and have never been a candidate for public office since 1998.

35. In one advertisement, featuring what I believe to be the voices of Justices Markman, Taylor and Young, the ads for the candidates nominated by the Democratic Party were characterized as "vicious", "false", "silly" a "smear campaign" and "degrading the Court and the public's confidence in Michigan's judiciary". The advertisement then continues, "Some people will do anything to get elected. No wonder Geoffrey Fieger, Jesse Jackson [and others who support the Democratic candidates] . . .".

36. The implication of that ad seems to be that I supported the adversaries of these Justices because of my fondness for vicious, false and degrading statements, an implication which I regard as an expression of bias or prejudice toward me by Justices Markman, Taylor and Young.

37. An another example, the "Victory Line" publication, which promoted the candidacy of Justices Young, Taylor and Markman, attacked me by name and accused me of using "specious legal reasons" to foster "The virtual

explosion of litigation - - most of which is frivolous, excessive and very expensive for taxpayers."

38. I am deeply concerned with the announcement that most litigation is frivolous, an announcement which suggests a predisposition to reverse a recovery for a plaintiff like Ms. Gilbert.

39. Another political advertisement on behalf of Justices Markman, Young and Taylor entitled, "He's back . . ." features my picture, and contends that ". . .Geoffrey Fieger [is] trying to take over Michigan's Supreme Court. Their strategy: elect liberal judges who are soft on crime", and characterizes the opposing candidates as "FIEGER's FRIENDS" and "the Fieger team".

40. Yet another piece of campaign literature issued on behalf of Justices Taylor, Markman and Young, entitled "Our police make critical judgements [sic] each day", criticized the opposing candidates as "Geoffrey Fieger's friends".

41. Another piece of campaign literature, which characterized Judge Fitzgerald as a "Geoffrey Fieger libera[l]", was entitled "Forever isn't long enough for a child molester", implying that I support sexual abuse of children.

42. A press release on March 3, 2000 criticizing candidate Marietta Robinson, issued by the Michigan Republicans, who nominated Justices Young, Markman and Taylor, criticized her as favored by "a multi-millionaire trial lawyer like Geoff Fieger" who, if elected, would allow "trial lawyers like Geoff Fieger [to] keep getting richer while Michigan families keep footing the bill".

43. These public statements on behalf of Justices Markman, Young and Taylor bespeak a bias or prejudice against me, a pre-occupation with my income and an implied predisposition to reverse cases in which I have achieved a significant recovery for a client.

44. I sincerely believe that for the reasons discussed above, Justices Corrigan, Taylor, Young and Markman are prejudiced or biased against me, and are predisposed to reverse any significant verdict returned in favor of any of my clients.

45. This predisposition has also been discerned by public commentators such as former President of the State Bar of Michigan Eugene Mossner and in the popular media.

46. I sincerely believe that it would create an appearance of impropriety for Justices Markman, Corrigan, Young and Taylor to participate in deciding this appeal on its substantive merits.

47. I believe that, if an evidentiary hearing were held, all of the above asser-tions of fact could be proven, and that yet other instances of comments or conduct adverse to me or my clients would be unearthed.

/s/
GEOFFREY NELS FIEGER

Subscribed and sworn to before me this
day of April, 2003

/s/

Notary Public
Oakland County, Michigan
My Commission Expires: